Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

Pending Legislation Targets Military Environmental Compliance

On 13 June 2001, Representative Bob Filner (D-CA) introduced legislation entitled "The Military Environmental Responsibility Act" (MERA).[1] The MERA has been referred to various subcommittees and is still in the early stages of the legislative process. Nevertheless, this legislation has already sparked questions and some debate, making it worthy of a brief summary for the benefit of field practitioners.

At a news conference, Congressman Filner described the military as "environmentally unaccountable for the last several decades."[2] It is with this mindset that he introduced the MERA. The MERA basically seeks to "entirely waive any and all sovereign immunity" under all federal and state laws designed to protect the environment or the health and safety of the public.[3] At a glance, this language seems like an extension of the Federal Facilities Compliance Act (FFCA) of 1992.[4] A closer read, however, reveals that the waiver of sovereign immunity does not apply to all federal facilities as it does under the FFCA.

Under the MERA, the proposed waiver of sovereign immunity applies to "federal defense agencies." The bill defines "federal defense agencies" to include: the Department of Defense (DOD); the Department of Energy (DOE); the Nuclear Regulatory Commission; the Office of Naval Nuclear Reactors; any other defense-related agency of the United States designated by the President; and installations, facilities, and operations of DOD and other defense-related agencies, both inside and outside the United States.[5] In other words, the MERA's reach does not apply equally to all federal facilities. Rather, the MERA focuses only on DOD, DOE, and related organizations.[6]

The MERA is intended to apply to the following environmental statutes: the Atomic Energy Act of 1954; the Clean Air Act; the Comprehensive Environmental Response, Compensa-

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1. H.R. 2154, 107th Congress (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h2154ih.txt.pdf.

2. Hearst News Service, *Bill Would Apply Environmental Rules to Military*, DALLAS MORNING NEWS, June 16, 2001, at 5A.

3. H.R. 2154 § 2(2). Note that the Safe Drinking Water Act, 42 U.S.C.S. §§ 300f to 300j-26 (LEXIS 2001), and the Solid Waste Disposal Act, *id*. §§ 6901-6992k, are not covered by the MERA because these laws already contain sovereign immunity waiver provisions "that otherwise appropriately provide for protection of the environment and the health and safety of the public." H.R. 2154 § 3(c).

4. 42 U.S.C.S. § 6961(a).

> In general. *Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government* (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions or injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program.

Id. (emphasis added).

5. H.R. 2154 § 3(a).

6. *See id*.

tion, and Liability Act of 1980; the Coastal Zone Management Act of 1972; the Department of Energy Organization Act; the Emergency Planning and Community Right-to-Know Act of 1986; the Endangered Species Act of 1973; the Federal Water Pollution Control Act; the Marine Mammal Protection Act of 1972; the National Environmental Policy Act of 1969 (NEPA); the Noise Control Act of 1972; the Nuclear Waste Policy Act of 1982; the Occupational Safety and Health Act of 1970; the Oil Pollution Act of 1990; and the Robert T. Stafford Disaster Relief and Emergency Assistance Act. This, however, is not an exhaustive list.[7]

In short, the MERA subjects each federal defense agency to both the substantive and procedural requirements of the applicable laws mentioned above "in the same manner and to the same extent as any individual is subject to those requirements."[8] The MERA goes on to address exemptions by providing for the revocation of "any exemption otherwise applicable to a Federal defense agency."[9] The bill includes language expanding the basis for citizen suits,[10] but contains no rationale explaining why such expansion is desirable. The bill also seeks to limit the use of presidential exemption authority, without citing a basis for concluding that DOD has abused or attempted to abuse the exemption provisions.[11] Another provision mandates liberal judicial interpretation of the MERA "to effect the intent of Congress."[12] The MERA also specifically subjects weapon system development and procurement to compliance with the NEPA.[13] Notably, there is no provision in the bill that addresses classified information.

When Congressman Filner introduced the MERA , various grassroots groups endorsed the legislation. These included national organizations such as: Military Toxics Project, Indigenous Environmental Network, Center for Marine Conservation, and the Center on Conscience and War. Various other state and local groups have also endorsed the bill.[14]

Clearly, the "purpose" section of the MERA states a strong intent to waive sovereign immunity and revoke exemptions with respect to defense-related agencies.[15] What remains unclear is the rationale for focusing on defense-related agencies in this manner. The bill fails to refer to any factual findings or other empirical data to support or validate the MERA's purpose.

In July 2001, the DOD was given an opportunity to comment on the bill. In the comments, DOD characterized as "false" the premise that DOD is exempt from environmental laws. The comments also noted that DOD is subject to environmental constraints not imposed on the private sector. The comments further emphasized that the limited military exemptions currently allowed by law result from carefully balanced consideration of all interests.[16]

There has been no action on the MERA in either the Senate or the House of Representatives since the terrorist attacks on 11 September 2001; however, the legislation is still pending. Meanwhile, on 5 October 2001, a group of ten members of Congress sent a letter to the Secretary of Defense inquiring about DOD's policy for invoking the National Security Waiver exemption under the Endangered Species Act (ESA).[17] The letter notes that, to date, the Secretary of Defense has never invoked the exemption and has no process in place for reviewing the exemption should it ever be invoked.[18]

When this letter is read in the context of the MERA's focus on defense-related agencies, one can readily surmise a wide range of opinions about the degree of DOD's environmental accountability. At a minimum, some unbiased empirical data would assist Congress in evaluating the proposed legislation.

Personnel can track the progress of the MERA at http://thomas.loc.gov. This Web site provides a copy of the bill and a

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7. *Id*. § 3(c). The MERA includes these statutes and their analogous state counterparts "at a minimum." *Id*.

8. *Id*. § 3(b).

9. *Id*.

10. *Id*. § 3(g).

11. *See id*. § 3(e).

12. *Id*. § 3(h).

13. *Id*. § 4.

14. *See* Military Toxics Project, *Endorsers of the Military Responsibility Act, at* http://www.miltoxproj.org/HCC/Endorsers.htm (last visited Oct. 23, 2001).

15. H.R. 2154 § 2.

16. Interview with Lieutenant Colonel Jacqueline R. Little, Chief, Compliance Branch, Army Envtl. Law Div., U.S. Army Legal Servs. Agency (Oct. 23, 2001).

17. Letter from Ten Members of Congress to Sec'y of Defense Donald H. Rumsfeld (Oct. 5, 2001) [hereinafter ESA Letter] (on file with author). The ESA is one of the statutes for which the MERA would seek to abolish exemptions for national security. *See supra* note 7 and accompanying text.

18. ESA Letter, *supra* note 17.

chronology of the bill's progression in the legislative process. Major Arnold.

District of Columbia District Court Puts Advisory Council on Historic Preservation in Its Place

In a recent case, oddly hailed as a victory by the Advisory Council on Historic Preservation (Council), the District Court for the District of Columbia made rulings that dramatically impact federal agency compliance with section 106 of the National Historic Preservation Act (NHPA).[19] In *National Mining Association v. Slater*,[20] the National Mining Association (NMA) and the Cellular Telecommunications & Internet Association (CTIA) brought suit under the Administrative Procedures Act[21] to set aside the Council's final rule (Final Rule)[22] setting forth revised regulations for implementation of section 106. After determining that plaintiffs had demonstrated standing and ripeness, the court reviewed the parties' cross-motions for summary judgment. Based on its review, the court dismissed the majority of plaintiffs' claims. It did find, however, that two important provisions of the Council's regulations were substantive rather than procedural and thus violated the plain language of the NHPA.[23]

Section 106 of the NHPA (Section 106) sets forth two basic compliance requirements.[24] Before authorizing any project that may affect a historic property,[25] an agency must first consider the project's effects and thereafter provide the Council a reasonable opportunity to comment on the project. Federal agencies, including the Army, comply with these mandates by following the detailed case-by-case regulatory review procedures set forth in part 800 of Title 36, Code of Federal Regulations (CFR), "Protection of Historic Properties."[26] After Congress amended the NHPA in 1992, the Council consulted with a wide range of stakeholders and determined that regulator revisions were necessary in light of the congressional amendments.[27] The Council therefore initiated the rule-making process; it published the new regulations on 18 May 1999.[28] Following a legal challenge by the NMA, the Council withdrew the regulations, reopened the rule-making process, and on 12 December 2000 the Council published a Final Rule.[29] The NMA and CTIA challenged the Final Rule in *National Mining Association*.[30]

The Final Rule, like its predecessor regulations, established a basic process by which federal agencies identify properties and evaluate their historic significance, assess the effects of their actions on such properties, consider alternatives to avoid adverse effects, and enter into agreements to mitigate adverse effects when they cannot be avoided.[31] The court did not find any legal deficiencies with this basic procedural framework.[32] It was concerned, however, that the Council strayed from procedural to substantive mandates.[33]

The court observed that Congress, through Section 106, had imposed "procedural" obligations on federal agencies but reserved to such agencies the sole duty to make "effects" determinations.[34] The court found that the Council strayed impermissibly beyond the plain language of the statute when it

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19. *See* 16 U.S.C.S. § 470-470w (LEXIS 2001).

20. Nat'l Mining Ass'n v. Slater, Cellular Telecomm. & Internet Ass'n v. Slater, Nos. 00-00288 and 01-00404, consolidated op. 2001 U.S. Dist. LEXIS 14694 (D.D.C. Dec. 18, 2001) [hereinafter Nat'l Mining Ass'n].

21. 5 U.S.C.S. §§ 701-706 (LEXIS 2001).

22. The Final Rule is published at 65 Fed. Reg. 77,698 (Dec. 12, 2001) (to be codified at 36 C.F.R. pt. 800).

23. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *2.

24. *See* 16 U.S.C.S. § 470f (LEXIS 2001).

25. A historic property is any site, district, structure or object that is either listed or eligible for listing in the National Register of Historic Places. *See* 36 C.F.R. § 800.16(l) (LEXIS 2001).

26. *Id*. pt. 800.

27. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *12.

28. *Id*. at *14.

29. *Id*. at *14-15.

30. *Id*. at *15.

31. *See* 36 C.F.R. § 800.3-.7 (LEXIS 2001).

32. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *46.

33. *Id*. at *52.

imposed "substantive" mandates by reserving the right to second-guess federal agency "effects" determinations and force further section 106 consultation.[35]

The court concluded that this occurred in two provisions of 36 CFR part 800: subparts 4(d)(2) and 5(c)(3).[36] The former provision forces an agency to continue Section 106 consultation if the Council disagrees with the agency's conclusion that there are *no historic properties affected* by the proposed action.[37] The latter provision authorizes the Council to force further Section 106 consultation if it second-guesses the agency's conclusion that an action will have *no adverse effects* on historic properties.[38] The court explained:

> Both of these provisions cross the line from procedure into substance because they require an agency to proceed with the Section 106 process in the face of that agency's own determination to the contrary. '[T]he practical consequences of the[se] provisions would have been such as to interfere with [an agency's] ability to exercise its statutorily guaranteed prerogatives.' Both of these provisions plainly give the [Council] the authority to review and effectively reverse—at least for the purpose of continuing the Section 106 process—the agency's determination with respect to the effects of an undertaking on historic properties. Making that determination, however, is the one substantive role that is expressly delegated to the agency in Section 106 of the Act. Sections 800.4(d)(2) and 800.5(c)(3) thereby enable the Council to interfere directly with the agency's responsibility in this respect, and as such, they are impermissible substantive regulations.[39]

This decision provides much needed clarification to the distinct roles played by federal agencies and the Council in the Section 106 review process. It unequivocally pronounces that federal agencies are solely responsible for the determination of effects on historic properties.[40] Should this ruling stand on appeal, the Council, at the behest of dissatisfied stakeholders, including State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs), will no longer have the authority to second-guess an agency's "no historic properties affected" and "no adverse effect" findings. In recognition of this limitation, the Council recently issued the following interim guidance:

> [T]he Council plans to provide opinions to Federal agencies regarding their "no historic properties affected" findings, pursuant to Section 800.9(a) of its regulations, whenever appropriate. However, such opinions will be advisory and will not require the Federal agencies to continue to the next step in the Section 106 process.
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> In the event that a SHPO/THPO does not agree with a finding of "no historic properties affected," the agency official should notify the Council and seek an advisory opinion. The Council believes this interim step, while not mandatory, would help resolve disputes and avoid the potential for litigation or other delays.
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> The Council will continue reviewing "no adverse effect" disputes referred to it under Section 800.5(c)(2) within the allotted 15 day period. Nevertheless, the Council's opinion on such matters will be advisory and will not require agencies to proceed to the next step in the process.[41]

Environmental law specialists at the installation level should provide cultural resource managers with copies of *National Mining Association* and the Council's interim guidance, and explain their implications. The court's ruling, as implemented by the Council's interim guidance, imposes a significant departure from the traditional Section 106 process, particularly the authoritative roles of the Council and the SHPO/THPO. Mr. Farley.

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34. *Id*.

35. *Id*. at *58-60.

36. *Id*. at *61.

37. 36 C.F.R. § 800.4(d)(2) (LEXIS 2001).

38. *Id*. § 800.5(c)(3).

39. *Nat'l Mining Ass'n*, 2001 U.S. Dist. LEXIS 14694, at *58-60 (quoting Dep't of the Treasury v. Federal Labor Relations Authority, 857 F.2d 819, 821 (D.C. Cir. 1994)) (internal citations omitted).

40. *Id*. at *45-46.

41. Advisory Council on Historic Preservation, *Section 106 Regulations Users Guide*, *at* http://www.acgo.giv/news-regsopinion.html (last visited Oct. 23, 2001).

Encroachment: Putting the "Squeeze" on the Department of Defense (DOD)

Over the past year, DOD and the armed services (Services) conducted a rigorous analysis of "encroachment" and impacts on military testing and training. From DOD's perspective, encroachment includes external influences, such as environmental laws and regulations, threatening or constraining testing and training activities on DOD ranges and facilities required for force readiness and weapons acquisition.[42] Corresponding impacts involve restrictions on available locations, times, and duration, and reduced effectiveness, of testing and training activities.[43] Additional adverse impacts involve restrictions on weapons systems, equipment, and munitions used during testing and training.[44] The Department's interest in these restrictions on military training has been accompanied by increased congressional concern as exhibited by Senate Armed Services Committee (SASC), House Committee on Government Reform (HCGR), and House Armed Services Committee (HASC) formal hearings focused on this issue.[45]

Within DOD, the Senior Readiness Oversight Council (SROC), chaired by the Deputy Secretary of Defense, first addressed encroachment issues affecting test and training ranges in June 2000. At that session, the Service Chiefs of Staff briefed the SROC regarding constraints on their respective ranges, and how those constraints affect the conduct and character of training.[46] Although direct effects of any specific limitation vary by range and activity, DOD is concerned with a number of issues.[47] In November 2000, the SROC's initial review focused on the following nine range-related issues and action plans to address the encroachment of environmental requirements affecting DOD: Endangered Species Act and Critical Habitat (Marine Corps lead), Unexploded Ordnance and Munitions (Army lead, Office of the Deputy Chief of Staff for Operations (Training)), Bandwidth and Frequency Encroachment (Office of the Secretary of Defense lead), Maritime Sustainability (Navy lead), National Airspace System (Air Force lead), Air Quality (Navy lead), Airborne Noise (Air Force lead), Urban Growth (Marine Corps lead), and an Outreach Plan (DOD Defense Test and Training Steering Group lead).[48] The Services continue to refine those action plans, and look toward the future to address overseas ranges, space, airspace restrictions, water use, cultural resources, ecosystem and biodiversity, and land use.

The Army, like other services, has found itself struggling to reconcile environmental compliance requirements with the need for realistic training.[49] To ensure that the Army is ready to accomplish its primary mission of fighting and winning in armed conflict, soldiers, leaders, and units must receive proper training.[50] Effective training must provide soldiers with opportunities to develop and improve proficiency, competence, and confidence in the use of sophisticated weapons systems under combat-like conditions.[51] Those conditions must be realistic and physically and mentally challenging.[52]

Environmental encroachment limits the Army's ability to conduct realistic training and adequate testing activities.[53] "The Army's primary encroachment concerns are urban sprawl,

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42. *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001) (statement of Major General Robert L. Van Antwerp, Assistant Chief of Staff for Installation Mgmt., at 5) [hereinafter Van Antwerp Statement], *available at* http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/01-05-22vanantwerp.html.

43. *Fiscal Year 2002 Army Budget: Hearing Before the Defense Subcomm. of the Senate Appropriations Comm.*, 107th Cong. (2001) (written responses to questions by General Eric K. Shinseki).

44. *Id.* at 1.

45. *See Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001), *available at* www.house.gov/reform/military/index.htm; *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://commdocs.house.gov/committees/security/has142030.000/has142030_0x.htm; *Range Encroachment Hearing Before the Readiness and Mgmt. Support Subcomm. of the Senate Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://www.senate.gov/~armed_services/hearings/2001/r010320.htm.

46. *See* DEP'T OF DEFENSE MONTHLY READINESS REPORT TO CONGRESS 2 (Dec. 2000) [hereinafter DOD READINESS REPORT].

47. *Id*. at 2; *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001) (statement of Mr. Joseph J. Angello, Jr., Acting Deputy Under Sec'y of Defense for Readiness, at 6) [hereinafter Angello Statement], *available at* http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/01-05-22angello.html.

48. DOD READINESS REPORT, *supra* note 46, at 2-3.

49. *See generally Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001) (statement of Lieutenant General Larry R. Ellis) [hereinafter Ellis Statement], *available at* www.house.gov/reform/hearings/05.09.01/ellis.htm.

50. *Id.* at 2.

51. *Id.*

52. *Id*; *see also* Van Antwerp Statement, *supra* note 42, at 3.

threatened and endangered species, and restrictions that impact munitions use."[54] Until the last thirty years, Army training lands had been remote areas with little residential or commercial development. Public awareness of live training activities was minimal.[55] Population and economic growth around installations have caused ranges and training lands to become "islands of biodiversity," thereby increasing their value as natural resources.[56] Additionally, the Army has created environmental concerns by using a variety of weapons on its ranges and training lands for many years. The Army leadership has called for a more balanced approach that would ensure that environmental statutes and regulator decisions consider the importance of our national defense mission and recognize readiness as a positive societal good and a legal mandate.[57] In testimony to Congress, the Army expressed a desire to work with other federal agencies, Congress, and the Administration to reduce uncertainty and increase flexibility in laws and regulations to ensure a balance between national security and environmental needs.[58]

When Congress conducted formal hearings and asked the military services about encroachment and its impacts on training and readiness, the Army staff leadership presented its concerns. On 20 March 2001, the Army's Assistant Chief of Staff for Installation Management (ACSIM) and other service representatives testified at the SASC Subcommittee on Readiness and Management encroachment hearings.[59] The ACSIM, other service representatives, and the Acting Deputy Under Secretary of Defense for Readiness testified at the 22 May 2001 HASC, Subcommittee on Military Readiness encroachment hearing, "Constraints and Challenges Facing Military Test and Training Ranges."[60]

The HCGR visited Fort Hood, Texas, in April 2000. On 9 May 2001, the Army's Deputy Chief of Staff for Operations and Plans and the Commanding General, III Corps and Fort Hood, testified at the Committee's hearing, "Challenges to National Security: Constraints on Military Training," regarding encroachment impacts on readiness and training.[61] The HCGR requested that the U.S. General Accounting Office (GAO) review the limitations placed on the military's use of U.S. ranges. Accordingly, on 2 May 2001, the GAO wrote to the Secretary of Defense indicating that it will review training limitations and increased costs for alternative training arrangements due to environmental encroachment and other constraints.[62] The GAO also announced that, at the SASC Readiness Subcommittee's request, the GAO is reviewing limitations on the ability of U.S. forces to train overseas.[63]

Since the service representatives testified at the congressional encroachment hearings, correspondence continues to illustrate the hotly contested nature of this issue. On 24 May 2001, the Chairmen of the HCGR and the House Committee on Resources, as well as fourteen other members of Congress, wrote to President Bush urging him to initiate government reforms that address encroachment impacts because "these problems are affecting the ability of our forces to fight."[64] They stressed that the central question is how to cooperatively balance the important national interests of readiness, environment, development, and commercial aviation. Their letter enclosed a tape of the HCGR hearing and a copy of the witnesses' testimony.[65] On 31 May 2001, twenty-nine state attorneys general signed a letter from the National Association of Attorneys General (NAAG) to the SASC, HASC, Senate Environment and Public Works Committee, and House Committee on Energy

53. Van Antwerp Statement, *supra* note 42, at 5.

54. *Id.* at 6.

55. Ellis Statement, *supra* note 49, at 4.

56. *Id.* at 5; Angello Statement, *supra* note 47, at 5.

57. Ellis Statement, *supra* note 49, at 4.

58. Van Antwerp Statement, *supra* note 42, at 11.

59. *See Range Encroachment Hearing Before the Readiness and Mgmt. Support Subcomm. of the Senate Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://www.senate.gov/~armed_services/hearings/2001/r010320.htm.

60. *See Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001), *available at* http://commdocs.house.gov/committees/security/has142030.000/has142030_0x.htm.

61. *See Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001), *available at* www.house.gov/reform/military/index.htm.

62. Letter from Barry W. Holman, Director, Defense Capabilities and Mgmt., U.S. Gen'l Accounting Office, to Sec'y of Defense Donald H. Rumsfeld (May 2, 2001) (on file with author).

63. Letter from Neal P. Curtin, Director, Defense Capabilities and Mgmt., U.S. Gen'l Accounting Office, to Sec'y of Defense Donald H. Rumsfeld (May 17, 2001) (on file with author).

64. Letter from Representative Dan Burton and Representative James V. Hansen, House Comm. on Gov't Reform, to President George W. Bush (May 24, 2001) (on file with author).

and Commerce in response to the SASC 20 March 2001 encroachment hearing.[66] The NAAG members stressed "that federal agencies are not above the law" and that extensive consultation with the states and congressional hearings (with the opportunity for interested parties to present their views) should occur before considering any proposal to exempt or limit federal agency obligations under environmental laws.[67]

For now, the encroachment issue remains contentious and highly divisive in Congress. In the DOD arena, the military services, with the DOD as the lead, will continue to analyze and develop responses to encroachment and the effects on testing and training activities. Lieutenant Colonel Schenck.

Procurement Fraud Division Note

It is widely known within the government contracting field that a suspended or debarred firm may continue, under certain conditions and types of contracts, to do business with the government even after being placed on the General Service Administration (GSA) *List of Parties Excluded From Federal Procurement and Nonprocurement Programs* (*List*).[68] In particular, under indefinite delivery/indefinite quantity (IDIQ) contracts, the Federal Acquisition Regulation (FAR) permits contracting activities to place orders with a suspended or debarred contractor.[69] What may be less well known, however, is that for Department of Defense contracting activities, reliance on the FAR provision alone as authority for continued dealings with GSA-listed contractors could lead to the improper award of IDIQ contract delivery orders.

The effect of "listing" with the GSA is sweeping. Federal Acquisition Regulation section 9.405 states:

> 9.405 Effect of Listing
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> (a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head or a designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.[70]

The FAR, however, does not preclude the continuation of existing contracts with listed contractors. Rather, under FAR 9.405-1(a), "agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head or a designee directs otherwise."[71] Specifically, FAR 9.405-1(b) sanctions the continued placement of "orders against existing contracts, including indefinite delivery contracts, in the absence of termination."[72]

A contracting officer who reads no further than these provisions may conclude that he is free, without limitation, to place orders against existing IDIQ contracts. For contracting activities subject to the Defense Federal Acquisition Regulation Supplement (DFARS), however, further inquiry is necessary before issuing delivery orders under an existing IDIQ contract with a GSA-listed contractor.

Defense Federal Acquisition Regulation Supplement 209.405-1(b) states: "Unless the agency head makes a written determination that a compelling reason exists to do so, ordering activities shall not (i) [p]lace orders exceeding the guaranteed minimum under indefinite quantity contracts; or (ii) [w]hen the agency is an optional user, place orders against Federal Supply Schedule contracts."[73] Thus, for IDIQ contracts with a GSA-listed contractor, the contracting officer must know whether the guaranteed minimum order amount has been reached.[74] For Federal Supply Schedule (FSS) contracts, however, DFARS 209.405-1(b) completely negates the FAR exemption.[75]

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65. *Id*.

66. Letter from the Nat'l Ass'n of Att'ys Gen'l to the Senate Armed Servs. Comm., House Armed Servs. Comm., Senate Environment and Public Works Comm., and House Comm. on Energy and Commerce (May 31, 2001) (on file with author).

67. *Id*. at 1.

68. *See* Acquisition Reform Network, *List of Parties Excluded From Federal Procurement and Nonprocurement Programs*, Excluded Parties List System, *at* http://epls.arnet.gov/epls_reports/EPLR_PN.LIS (last modified Dec. 12, 2001).

69. 48 C.F.R. § 9.405(a) (LEXIS 2001).

70. *Id*.

71. *Id.* § 9.405-1(a).

72. *Id*. § 9.405-1(b).

73. *Id*. § 209.405-1(b).

Government contracting professionals must remember the DFARS limitation on continued IDIQ contracts. Following the placement of a firm under an existing IDIQ contract on the GSA *List*, the contracting officer should compare the level of orders issued to the guaranteed minimum. Where there is still "room" under an IDIQ contract's guaranteed minimum, a contracting officer who elects to continue the contract must closely monitor future orders. When the guaranteed minimum has been reached, further delivery orders should cease. For FSS contracts, however, contracting activities must refrain immediately from issuing delivery orders to GSA-listed contractors.

Widespread knowledge of the FAR's permissiveness regarding the continuation of dealings under IDIQ contracts, combined with ignorance of the DFARS restrictions on such dealings, is a recipe for improper contract actions and protests. Lieutenant Colonel O'Keeffe.

74. *See id*. § 209.405-1(b)(i).

75. *See id*. § 209-405.1(b)(ii).